National Energy Board

Reasons for Decision

TransCanada PipeLines Limited

Great Lakes Refund

September 1996

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In the Matter of

TransCanada PipeLines Limited

Application dated 12 October 1995

Great Lakes Refund

September 1996

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Abbreviations

Act	*National Energy Board Act* (the)
ANR	ANR Pipeline Company
Board	National Energy Board (the)
Brymore	Brymore Energy Ltd.
CAPP	Canadian Association of Petroleum Producers
Consumers	Consumers' Gas Company Ltd., The
CRTC	Canadian Radio Television and Telecommunications Commission
FERC	Federal Energy Regulatory Commission
FST	Firm Service Tendered
FT	Firm Transportation
Great Lakes	Great Lakes Gas Transmission Limited Partnership
LT-WFS	Long-Term Winter Firm Service
ProGas	ProGas Limited
RH-2-95	Hearing Order in respect to TransCanada's application for new tolls effective 1 January 1996.
RH-1-88	Hearing Order under which one of the issues addressed was the disposition of the 1987 deferral account balances.
STFT	Short-Term Firm Transportation
STS	Storage Transportation Service
TBO	Transmission by Others
Tennessee	Tennessee Gas Pipeline Company
TransCanada	TransCanada PipeLines Limited
Wascana	Wascana Energy Inc.
WGML	Western Gas Marketing Limited

Recital and Submittors

IN THE MATTER OF the *National Energy Board Act* and the Regulations made thereunder; and

IN THE MATTER OF an application by TransCanada PipeLines Limited dated 12 October 1995, to address the manner in which TransCanada shall dispose of amounts to be received by way of a refund from Great Lakes Gas Transmission Limited Partnership; and

IN THE MATTER OF National Energy Board Directions on Procedure issued 24 November 1995 and further updates of 27 December 1995, 5 January 1996, and 5 March 1996;

EXAMINED by means of written submissions.

BEFORE:

J.A. Snider	Presiding Member
K.W. Vollman	Member
R. Illing	Member

SUBMITTORS:

TransCanada PipeLines Limited

ANR Pipeline Company

Brymore Energy Ltd.

Canadian Association of Petroleum Producers

Consumers' Gas Company Ltd. (The)

ProGas Limited

Tennessee Gas Pipeline Company

The Northeast Group

Wascana Energy Inc.

Chapter 1

Background

On 12 October 1995, TransCanada PipeLines Limited ("TransCanada" or "the Company") applied for an Order severing from the RH-2-95 proceeding, the issue of the manner in which TransCanada shall dispose of amounts to be received by way of a refund from Great Lakes Gas Transmission Limited Partnership ("Great Lakes"). TransCanada requested that the Board direct that "the Application" to consider the method of disposing of the refund be dealt with in a separate proceeding. On 9 November 1995, the Board approved TransCanada's request. By letter dated 24 November 1995, the Board established a Timetable of Events for processing the Application.

The Application refers to a Great Lakes' refund of substantial amounts paid by TransCanada in respect of rates calculated on an incremental basis for service on the Great Lakes' system during the period from 1 November 1991 to 30 September 1995. These incremental rates were charged by Great Lakes pursuant to a then subsisting U.S. Federal Energy Regulatory Commission ("FERC") Order, and were borne by TransCanada's shippers through the payment of tolls for service on TransCanada's system. The FERC has now determined that the payment of these incremental rates was unjust and unreasonable, and has approved a methodology whereby the overpayment during the time period in question will be returned to Great Lakes' incremental ratepayers.

The issue stems from a FERC ruling on 31 October 1991 where the FERC rejected Great Lakes' rolled-in rate proposals for two expansion projects (referred to as FERC Opinion Nos. 367 and 368). TransCanada, Great Lakes and other expansion shippers requested rehearing of Opinion Nos. 367 and 368 but were denied on 3 February 1993. On being denied a rehearing by the FERC, TransCanada and others petitioned the United States Court of Appeals for the District of Columbia Circuit for judicial review of Opinion Nos. 367 and 368. The court on 10 June 1994 found that Opinion Nos. 367 and 368 did not constitute reasoned decision-making and remanded the proceedings back to the FERC for further consideration. On 26 July 1995, the FERC issued an Order on Remand reversing Opinion Nos. 367 and 368 and ordering costs of the expansion be rolled-in to system-wide rates. Subsequent orders were issued by the FERC, dated 25 April 1996 and 2 August 1996. These orders related to: rehearing; reconsideration; clarification; and compliance in respect to this issue and rejected petitioners' claims that the remedy imposed by the remand order is inequitable, and denied rehearing and reconsideration of the issue, and also approved revised tariff sheets from Great Lakes.

On 27 December 1995, the Board directed TransCanada to immediately place all funds which it receives that are related to the refund in an interest-bearing account and, once deposited, not to release any of these funds until the Board has issued a final decision. Additional letters, dated 5 January 1996 and 12 January 1996, were issued by the Board to grant The Northeast Group intervenor status and to serve information requests on TransCanada.

On 5 March 1996, the Board noted that TransCanada had raised the issue of whether or not the Board has the jurisdiction to order that the refund be made on a historical as opposed to a prospective basis. As a result, the Board provided parties the opportunity to submit their comments on this issue.

Chapter 2

TransCanada's Proposal

TransCanada requested that it be permitted to pay out the Great Lakes' refund to current firm shippers on TransCanada's system on a prospective basis by crediting these shippers' monthly invoices for service as soon as possible following TransCanada's receipt of funds. TransCanada also requested that the refund be allocated among current firm shippers on a fixed volume distance basis. In response to an information request from The Consumers' Gas Company Ltd. ("Consumers"), TransCanada indicated that, for the purposes of the Great Lakes' refund, the definition of current firm shippers would include FT, STS and FST shippers.

TransCanada noted that the net refund it expected to receive would be approximately $33.8 million (U.S.). In its reply comments, TransCanada increased this estimate to $38 million (U.S.). TransCanada indicated that it expected to receive the refund over a period of approximately three years commencing in 1996.

Chapter 3

Main Issues

3.1 Historical versus Prospective Allocation of Refund

TransCanada contended that its proposal to credit shippers' invoices on a prospective basis is in accordance with fundamental regulatory principles and is just and reasonable in the circumstances. The Company noted that a limited number of shippers during the period in question are no longer shippers on the system. TransCanada pointed out that it would be extremely difficult, if not impossible, to track shippers pursuant to assignments/release arrangements.

ANR Pipeline Company ("ANR"), Brymore Energy Ltd. ("Brymore") and Tennessee Gas Pipeline Company ("Tennessee") were the only parties opposed to distributing the refund on a prospective basis.

ANR submitted that the refund should be made on a historical basis to those shippers of record on TransCanada's system during the period 1 November 1991 to 30 September 1995. ANR emphasized that the FERC determination was not simply that the payment of incremental rates was unjust and unreasonable but that the expansion shippers have been subjected to unlawful incremental rates. ANR contended that it is for this reason that the FERC determined that it is equitable to refund the excess amounts paid. ANR submitted that no one would countenance TransCanada keeping the refund it will receive from Great Lakes. Rather, ANR claimed, the issue becomes the identification of the proper recipient of the refund. Recognizing the Board is not bound by the FERC's approach, ANR noted that the FERC has provided for a refund on a historical basis with corresponding retroactive rate adjustments. ANR maintained the heart of this matter is the obvious inequity and demonstrable lack of fairness in a proposal which provides a refund to parties which did not make the original payment. ANR also suggested that the issue of a refund of a deferral account balance which was addressed by the Board in RH-1-88, is different from the current case.

Brymore, as a shipper on the Great Lakes' system between November 91 and November 93, noted that it is subject to retroactive rate surcharges under the terms of the FERC's Remand Order. Brymore stated that if the FERC had approved a prospective distribution of refunds in the Remand Order proceeding, TransCanada - itself a historical shipper on the Great Lakes' system - would have seen its refund substantially diminished. Brymore suggested that, having argued for a historical distribution of refunds, as well as a retroactive surcharge on certain historical shippers to finance that refund, TransCanada should not now be heard to request a prospective refund distribution. Brymore also maintained that the Board's previous ruling on the disposition of deferral account balances should not govern here since the refund is a specific credit, applicable to specified volumes and therefore should be credited directly.

Tennessee entered into purchase and sale agreements with Canadian suppliers during all or part of the period 1 November 1991 through 31 August 1995. Each of these suppliers was a firm service shipper on TransCanada. Under these contracts, Tennessee paid the Canadian suppliers amounts that included tolls that reflected the incremental rates. Tennessee maintained TransCanada's proposal would result in serious intergenerational inequities because it would deny any refunds to shippers who are not

current shippers on the TransCanada system, but who paid the excess charges by Great Lakes as reflected in the TransCanada tolls for past periods. Tennessee claimed the inequity visited upon itself would be made more egregious by the fact that Great Lakes had filed to recover surcharges from Tennessee, as a pre-expansion shipper, pursuant to the FERC Order. Under TransCanada's proposal, Tennessee would be unable to mitigate the effect of these surcharges via refunds from TransCanada.

Tennessee contended that only by allocating refunds to those parties originally responsible for their payment can the Board ensure that cost responsibility will track cost incurrence. Tennessee claimed that such a historical refund plan would be more equitable than the prospective plan advocated by TransCanada because a historical plan at least offers a substantial probability that refunds would flow to parties who paid the excess tolls during the past period. Under a forward-looking plan, there is guaranteed inequity and gross misallocation. Tennessee would have the Board direct TransCanada to allocate the Great Lakes' refund to the firm shippers that bore the costs of the incremental rates charged by Great Lakes to TransCanada during the period from November 1, 1991 to September 30, 1995. Tennessee noted that under TransCanada's proposal, an effective tollpayer, such as Tennessee, who is not a current shipper, would have no opportunity whatsoever to obtain a share of the refunds even where the relevant contract is clear and there is no dispute.

The Canadian Association of Petroleum Producers ("CAPP") supported TransCanada's applied-for prospective mode of refund for the reasons stated by TransCanada. CAPP noted that the topic was extensively covered in RH-1-88 where the Board confirmed the practice of making refunds on a prospective basis. CAPP stated that if the refund was done on a historical basis it would be inconsistent with the Board's long-standing practice of disposing of balances in deferral accounts in the forward test year. CAPP also stated that there is nothing about the present case to distinguish it from the RH-1-88 decision.

Consumers agreed with TransCanada's method of allocation and contended that a prospective pass through is consistent with the Board's past practice. Consumers stated that a retroactive pass through, by means of refunds would be appropriate if the Board committed an error in fixing tolls. However, Consumers noted that it was the FERC and not the Board who committed the error.

ProGas Limited ("ProGas") supported the methodology proposed by TransCanada and agreed with CAPP that the factors related to the disposition of a large refund by TransCanada were the subject of extensive consideration by the Board in Phase I of RH-1-88, wherein the Board confirmed the practice of making refunds on a prospective basis.

The Northeast Group as well as Wascana Energy Inc. ("Wascana") also offered support for TransCanada's proposed methodology.

TransCanada, in its reply argument, stated that virtually all of its shippers either support or do not oppose its proposal. TransCanada noted that the Board consistently requires adjustments to be made on a prospective basis. In the RH-1-88 proceeding, TransCanada proposed making the refund of the deferral account balance on a retrospective basis because of perceived intergenerational inequities. TransCanada noted the Board's Decision stated that there was nothing unique or exceptional to warrant a change from past practice. TransCanada did not agree with ANR's argument that a refund of a deferral account balance is different from the current case.

TransCanada maintained that no significant intergenerational inequity will result from its proposed method of allocating the refund as its customer base and demand has remained relatively stable over the years. TransCanada also stated that no allocation method will be perfect. TransCanada recommended the Board reject ANR's assertion that TransCanada has not protected its shippers interest as this assertion obfuscates reality. TransCanada maintained its proposal follows the Board's precedent and is the most equitable allocation in light of the burden that retroactive allocation would impose.

3.2 Administrative Difficulties

TransCanada maintained that any attempt to distribute the refund on a historical basis would present significant administrative difficulties.

ANR, Brymore and Tennessee maintained that the Board should reject TransCanada's argument of administrative difficulties. Brymore noted that these refunds are clearly due to the historical shippers of the time and if some incremental administration is required, the fairness of such a historical refund versus a prospective one must outweigh any alleged administrative difficulties. Tennessee claimed that TransCanada and shippers should have readily available the billing information and other records required to identify former shippers including those using TransCanada's system under assignments/releases.

CAPP and Consumers agreed with TransCanada's argument regarding administrative difficulties. Consumers noted that it as well as other distributors may also be required to calculate refunds for the same 47 month period, thereby adding significantly to the overall administrative burden.

TransCanada, in its reply comments, suggested that the additional administrative burden might include as much as 50 person days once the programs are in place to complete the work. TransCanada also noted that if interruptible and other discretionary services are included, the effort required would increase exponentially.

3.3 Legal Disputes

TransCanada contended that there may arise a substantial number of legal disputes because the current contracts do not contemplate the manner in which the refund should be dealt with.

ANR submitted that this argument is irrelevant. ANR noted that TransCanada is not alleging that they will be involved but rather that others will be involved. ANR noted legal disputes could arise even if the Board were to accept TransCanada's prospective proposal.

Tennessee noted that it did not accept TransCanada's argument that any inequity caused by making refunds on a prospective basis is outweighed by administrative difficulties and potential contract disputes.

3.4 Firm Only or Firm and Interruptible Shippers

ANR suggested that shippers using Interruptible Transportation and Discretionary Services may not be entitled to a share of the refund as these services are not cost based and the maximum tolls exceed the 100% load factor toll for comparable Firm Transportation service.

Brymore maintained that refunds must be directed to both firm and interruptible shippers on TransCanada's system during the period of applicability. As a shipper on Great Lakes' system between November 1, 1991 and November 1, 1993, Brymore is subject to retroactive rate surcharges. Since these refunds are clearly applicable to volumes delivered through the Great Lakes and TransCanada systems from 1 November 1991 to 30 September 1995, Brymore contends they must be credited to TransCanada's firm as well as interruptible shippers during that period. Brymore, as a firm and interruptible shipper on TransCanada's system after 1 November 1991, paid rates which included the costs of Great Lakes' capacity for which TransCanada may receive a refund. Having borne these capacity costs, Brymore contended that they as well as other historical shippers are entitled to receive any refunds ultimately approved by the FERC.

CAPP's position is that the method of allocation utilized should be the same cost allocation method used to calculate firm service demand charges.

Consumers stated that the refund should only be credited to firm shippers (i.e. FT, FST, and STS) on a fixed-volume distance basis.

Tennessee submitted that refunds should flow directly to the contract shipper, regardless of any release or assignment of the subject capacity. Tennessee stated that the ultimate disposition of refunds received by contract-shippers should be a matter to be resolved between such shippers and their capacity assignees, as dictated by the terms of their respective assignment/release agreements. Tennessee submitted that the refund be disbursed on the basis of the average demand units of TransCanada's firm shippers for the period 1 November 1991 to 30 September 1995.

TransCanada, in response to an information request from Consumers, stated that it did not propose to distribute any refunded amounts to STFT and seasonal services as facilities are not built and TransCanada does not enter into TBO contracts for these services. TransCanada also noted that it did not propose that LT-WFS shippers be eligible as this service was not offered during the period in question.

TransCanada requested that if the Board should decide a retroactive adjustment is required, the Board limit the retroactive allocation to firm transportation services (i.e., FT, FST, and STS). The Board should not, however, accept Tennessee's proposal to allocate refunds on the basis of average demand units. Allocation should be on the basis of fixed volume/distance allocation units irrespective of the applicable time period.

3.5 Whether TransCanada will benefit more from a Prospective Distribution

Tennessee noted that TransCanada's proposal would create an unjustifiable windfall for current shippers that were not on the TransCanada system during the prior refund period. Tennessee claimed that among the beneficiaries of such a windfall would be TransCanada's affiliate, Western Gas Marketing Company ("WGML") which took assignment of Tennessee's pre-expansion Great Lakes' capacity.

Tennessee asked that TransCanada provide certain information in order to determine if TransCanada's affiliates stand to realize substantially greater refunds under the as-filed prospective distribution plan, as opposed to an alternate retroactive plan.

TransCanada indicated that at no time in its deliberations on the appropriate allocation method for the Great Lakes' refund did it consider the relative impact on its affiliates, or indeed any particular shipper. However, TransCanada did indicate that the only affiliate eligible to receive a portion of the refund on a prospective basis would be TransCanada Gas Services (formerly WGML). TransCanada did not provide similar information on a historical basis. TransCanada also indicated that in its view, if any affiliate receives a portion of the refund, they do so as shippers just like any other shipper on the system.

3.6 Jurisdiction

In its reply argument, TransCanada contended that the Board may not have jurisdiction to make a retroactive adjustment. TransCanada noted that in RH-1-88, it was established that the Board's authority to retroactively adjust deferral account balances was a result of the fact that deferral accounts could be viewed as caused by interim tolls which would not be final until a decision on what to do with the deferral account balance was made. TransCanada further noted that in this case, the tolls established for the period 1 November 1991 to 30 September 1995 were final tolls. As a result, TransCanada suggested it is doubtful that the Board has the authority to adjust on a retroactive basis. TransCanada stated that its proposed allocation is not inconsistent with its argument before the FERC as the FERC can and must go back to remedy the results of unlawful incremental rate orders. TransCanada maintained there is no issue of Board error in this case and it is doubtful the Board has jurisdiction to order a retroactive refund.

In a letter dated 5 March 1996, the Board sought comments on the question of whether the Board has the necessary jurisdiction to order that the refund be made on a historical basis as opposed to a prospective basis.

Tennessee stated that this case did not involve an attempt by the Board to retroactively reduce final tolls, such that TransCanada must disgorge revenues it collected from its prior billings of final tolls. To the contrary, Tennessee contended that the sole issue here concerned the distribution of the Great Lakes' refund which TransCanada proposed from the outset of this proceeding to flow through to its customers. Tennessee was of the view that the Board has plenary jurisdiction over this matter pursuant to sections 12(1)b and 59 of the *National Energy Board Act* ("the Act") and concluded that the determination of the appropriate formula for distributing the Great Lakes' refund boils down to a question of fairness, not Board jurisdiction.

The Northeast Group agreed with TransCanada that there was little to distinguish this case from the case relating to the recalculation of the FST differential in which the Board concluded that any attempt to effect a toll adjustment for this period at the current time would result in retroactive rate-making which is contrary to law and the Board's practice. The practical effect of distributing the Great Lakes' refund to shippers on a historical basis would be, in the Northeast Group's view, to vary the final tolls approved by the Board for the relevant periods. As a matter of law, the Northeast group stated that authorities make clear that, absent a contrary intention appearing by express wording or by necessary implication in its governing legislation, a Board does not possess the legal authority to retroactively

adjust tolls set by a final order. The Northeast Group contended that no such authority to retroactively adjust tolls set by a final order appears in the Act either by express wording or by necessary implication.

ANR agreed with Tennessee's comments in that the Great Lakes' refund is not an issue related to reducing final tolls. ANR went on to discuss the *decision Bell Canada* v. *Canadian Radio - Television & Telecommunication Commission* ("CRTC")(1989) 97 NR 15 (SCC) (the "*Bell Canada*" case) and submitted that the conclusion which is to be derived from this case is that the Board does have jurisdiction to grant retroactive refunds, even if it did not appear to be so at first glance. In *Bell Canada*, Gonthier J., for the Court, found that the CRTC did have the power to direct retroactive rate decreases because the increase was an interim and not a final order. This power existed despite the fact that there was no express provision in the relevant statutes conferring such a power on the CRTC. The Court held that such a power existed by necessary implication to the CRTC's power to ensure "just and reasonable" rates on an interim basis.

ANR stated, that the ban on retroactive refunds was not enforced in *Bell Canada* because there is no concern over the need for financial stability with an interim decision. ANR submitted that the same could be said for the application before the Board in this case. ANR contended that TransCanada had no right, nor expectation, to keep the funds given to it as a result of the FERC Order. Thus the traditional rationale (financial stability) for the ban against retroactivity, had no more relevance to this application than it did to the refund in the *Bell Canada* decision.

ANR further argued that the Board's authority to grant the refund on a historical basis could be derived from the fact that such a power need not be explicit, but can arise by necessary implication from the Board's duty under section 62 of the Act to ensure that all tolls under section 59 of the Act are "just and reasonable".

Second, ANR argued that under section 21(1) of the Act, the power to review a decision could carry the power to order a retroactive refund. ANR submitted that this question was left open in *Bell Canada*.

Third, ANR argued that most important, was the determination in *Bell Canada* where Gonthier J. stated (at p. 60):

> "However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue."

ANR submitted that the quotation cited above provide the Board with the jurisdiction to make a retroactive order and the choice of the mechanism to implement this order (i.e. retroactive or prospective) is within the discretion of the Board.

TransCanada agreed with the Northeast Group's submissions.

TransCanada disagreed with ANR's interpretation of the *Bell Canada* case. TransCanada stated that the relevant case law, including the *Bell Canada* case, is clear that the test to be applied in these circumstances is whether the Board's enabling legislation expressly or by necessary implication vests jurisdiction in the Board to make an order adjusting tolls previously fixed by final order. TransCanada

further stated that this case law makes it clear that the Board's enabling legislation does not confer such jurisdiction.

TransCanada submitted that the Court's reasoning was based on the distinction between the fundamental nature of interim and final orders. The issue of the CRTC's jurisdiction to retroactively adjust tolls fixed by final order was never at issue before the Court and was never addressed in any substantive way. Therefore, TransCanada argued that the Court's reasoning relating to interim orders in *Bell Canada* could not be applied to the facts in this case.

TransCanada argued that the concern over financial impacts does not arise in the context of interim orders as everyone concerned must be aware that the tolls fixed by interim order are subject to retroactive adjustment. TransCanada argued that the same cannot be said for tolls fixed by final order upon which parties make arrangements with the expectation that the tolls fixed by those orders are not subject to retroactive adjustment.

TransCanada contended that the Court's comments in the *Bell Canada* case must be confined to the factual context of interim orders and cannot be taken to have overruled earlier judicial authority in this regard.

TransCanada was of the view that the question to be answered is whether the Board's enabling legislation expressly or impliedly confers jurisdiction on the Board to retroactively adjust tolls fixed by final order. TransCanada stated that the answer must be that it does not.

First, TransCanada argued that sections 21(1) and/or 62 of the Act cannot expressly or by necessary implication confer such jurisdiction on the Board since the regulatory scheme of the Act is generally prospective in nature. TransCanada contended that the proper interpretation to be given to the Act is that the power of the Board to adjust tolls should be limited to those fixed by interim orders, otherwise, section 64 of the Act would have no purpose.

With respect to the question of whether review powers as contained in section 21(1) of the Act could provide support for a finding that the Board has jurisdiction to order a refund on a historical basis, TransCanada argued that section 21(1), which in itself has no clear retroactive or prospective meaning, must be construed having regard the regulatory scheme of the Act as a whole which is prospective in nature.

With respect to the passage referenced by ANR in the *Bell Canada* case (at p. 60) which is as follows:

> "However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue."

TransCanada stated that this statement was clearly premised in the context of an interim order. TransCanada was of the view that in the present circumstances, as the Board does not have the power under its enabling legislation to retroactively adjust tolls fixed by final order, this statement was not applicable.

TransCanada disagreed with Tennessee's submissions. First, TransCanada was of the view that the Great Lakes' refund is in respect of amounts which were collected from it's tolls payers pursuant to

final tolling orders issued by the Board. TransCanada argued that the distribution of that refund on a historical basis would have the effect of retroactively adjusting the tolls paid pursuant to final Board orders and this the Board cannot do.

Second, TransCanada argued that sections 12(1)b and 59 of the Act do not give an express or an implied power to the Board to order the disbursement on a historical basis.

Third, TransCanada argued that the creation of a deferral account cannot be used to extend the Board's jurisdiction beyond that conferred by its enabling legislation. TransCanada noted that the Board has usually dealt with deferral account balances on a prospective basis.

Finally, TransCanada argued that the question of jurisdiction is always the first and fundamental issue facing the Board and that fairness is not the sole issue. TransCanada argued that if the Board does not have the jurisdiction, then, it is the end of the matter. Nonetheless, TransCanada argued that its requested order is fair in the circumstances.

3.7 Views of the Board

Given the nature of this issue, the Board agrees with TransCanada that no allocation method will be perfect. Consequently, the Board would note that whether it approves a prospective or historical distribution of the refund, there will be parties which feel they have been treated unfairly. Nevertheless, the Board, in resolving this matter, must determine the needs and interests of all parties and decide which distribution method results in the fairest outcome for all concerned under the applicable Canadian laws. While not bound by precedent, the Board must be cognizant of its past decisions such as RH-1-88 and those on FST matters wherein similar issues were addressed.

With respect to this matter, there were essentially two areas of argument: a) whether from an administrative or policy perspective, the Great Lakes' refund should be made on a historical or prospective basis; and b) whether the Board has the jurisdiction to order that the refund be made on a historical basis as opposed to a prospective basis. Under administrative or policy considerations, parties addressed the administrative difficulties associated with a historical refund; the possibility of intergenerational inequities with a prospective distribution; whether a prospective distribution would result in a greater benefit to TransCanada; the possibility of legal disputes; whether the refund should be credited to firm shippers only or firm and interruptible shippers; and the decisions of the FERC.

Administrative or Policy Considerations

With respect to parties' suggestions that a historical refund would present significant administrative difficulties, the Board is of the view that the relatively low cost of the administrative difficulties identified when compared to the size of the refund, would be insufficient to affect the Board's decision on this matter.

Based on TransCanada's statement that current contracts between shippers, producers and end-users likely do not provide for the disposition of refunds, the Board continues to believe, as it did in RH-1-88, that the probability that refunds distributed on a historical basis would, in certain cases, not flow to the effective tollpayers continue to be as great as, or greater than, any intergenerational inequities which may be avoided.

The Board was not persuaded by the suggestion that TransCanada purposely proposed a prospective distribution of the Great Lakes' refund in order to receive a greater financial benefit. In addition, the Board agrees with TransCanada in this case that any of its affiliates should be eligible for a portion of the refund as shippers just like any other shipper on the system.

The Board accepts ANR's view that legal disputes could arise if the Board were to approve TransCanada's proposed distribution of the refund. However, the Board is also of the view that the possibility of legal disputes which could result from the approval of TransCanada's proposal would be less than if the Board were to approve a historical distribution of the refund as current contracts do not contemplate the manner in which the refund should be dealt with.

In its order on rehearing, clarification, and compliance filing, dated 25 April 1996, the FERC stated that it agreed with TransCanada, Midland Cogeneration Venture Limited Partnership, and Great Lakes that any action the Board may take on TransCanada's refund proposal is irrelevant to the proceedings before the FERC. In addition, the FERC noted that neither body's jurisdiction extends beyond international borders. Similarly, the Board is of the view that any decision or action the FERC has taken on TransCanada's refund proposal is irrelevant to the proceedings before the Board. In addition, because neither body's jurisdiction extends beyond international borders, the Board is of the view that it must act in a manner which it believes is in the best interests of those parties under its jurisdiction and in accord with Canadian law.

Based on the above, and as stated in RH-1-88, the Board was not convinced by the evidence or argument that it should approve a distribution of the refund on a basis different from that for distributing deferral account balances, as this method has been considered fair and reasonable in the past.

Jurisdictional Issue

The Board has considered with interest the legal arguments put forward by the parties on the question of the Board's jurisdiction. The practical effect of distributing the refund to shippers on a historical basis would be to vary the final tolls approved by the Board for the years in question. The question which arises is whether the Board has the authority to order the refund in this manner, as such an order could be viewed as retroactive or retrospective toll-making.

It is a basic tenet of administrative law that an administrative tribunal only has those powers which are expressly or implicitly conferred on it by statute[1]. Unless such power is granted, administrative decisions are void.

Further, it is a well known principle that retroactive or retrospective operation of laws is the exception rather than the rule. Indeed, the need for predictability in the legal system is incompatible with the application of provisions to events that preceded their enactment. This rule has been expressed as follows by the Supreme Court of Canada:

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[1] *Duthie* v. *Grand Trunk R.W. Co.*, 4 CRC 304.

> "The general rule is that statutes are not to be construed as having retrospective operations unless such a construction is expressly or by necessary implication required by the language of the Act.[1]

This principle has been applied to decisions of administrative tribunals, in particular where tribunals have attempted to include a retroactive effect in their toll orders.[2]

Of course, there are exceptions to the rule against retroactive or retrospective operation of statutes. Parliament may set it aside; it can do so explicitly as is the case for section 64 of the Act. Parliament may also set the rule aside by way of necessary implication. As there is no express authority in the NEB Act to permit the Board to order the refund on a historical basis, then, if the Board is to find that it has the jurisdiction to issue such an order, the Board must find that this power is implied.

With respect to the argument of whether the necessary jurisdiction for the Board to order a refund on a historical basis is implied under any of the provisions of the Act, the Board is of the view that sections 12, 19 and Part IV of the Act tend to show an intention by Parliament to limit the jurisdiction of the Board as a whole to prospective regulation. However, an exception may be found in section 64, which is an express manifestation of Parliament's intent to allow retrospective operations in the context of interim orders. If the Board has an implied general power to retrospectively adjust tolls, there would have been no need for Parliament to include a specific provision for retrospective adjustments in section 64. Principles of statutory interpretation suggest that Parliament must be presumed to have intended that section 64 have a purpose in the scheme of the Act. Therefore, the Board is of the view that the "exclusion rule" should operate to prevent the extension of retrospective operation to apply to the Board's toll-making generally.

With respect to section 21(1) of the Act and ANR's submission that this section could provide the Board with the authority to order the refund on a historical basis, the Board is of the view that the scheme of the Act suggests that the power to review, as prescribed in section 21 of the Act which in itself has no express mention of retroactivity, does not include the power to change with retroactive or retrospective effects.

With respect to arguments made relying on the Supreme Court of Canada's decision in the *Bell Canada* case, the Board believes that the case can be distinguished from the situation before the Board in this instance. The reasoning of the Court in the *Bell Canada* case was directed to the issue of the power of the CRTC to retroactively adjust tolls fixed by *interim order*. In these proceedings, the Board is not dealing with its authority to make tolls interim or to make refunds for periods during which toll orders are interim. Rather, the issue is whether tolls paid under *final orders* of the Board can be retroactively adjusted. In the Board's view, the decision in the *Bell Canada* case is not applicable to the facts of these proceedings.

For these reasons, the Board believes that there is a significant doubt as to whether it has the jurisdiction to order the refund on a historical basis, as such an order could be viewed as retroactively adjusting tolls set by final order without any express or implied authority to do so.

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[1] Per Dickson J. in *Gustavson Drilling (1964) Ltd.* v. *Minister of National Revenue*, [1977] 1 S.C.R. 271, 279.

[2] *Re Western Decalta Petroleum Ltd. and Public Utilities Board of Alberta*, (1978), 86 D.L.R. (3d) 600 (Alta. C.A.).

In conclusion, either from an administrative or policy perspective or on a legal basis, the Board is of the view that distribution of the refund should be done on a prospective basis.

Decision

The Board approves, subject to other decisions appearing in these reasons, TransCanada's proposed distribution of the Great Lakes' refund on a prospective basis. In this regard, TransCanada is directed to credit all refunded amounts to current firm shippers (i.e. FT, STS, and FST shippers) on TransCanada's system by crediting said shippers' monthly invoices for service as soon as possible following TransCanada's receipt of funds. The refunded amounts should include any interest earned while the amounts to be refunded were in the interest bearing account in accordance with the Board's directive of 27 December 1995.

Chapter 4

Other Issues

4.1 Separate Item on Invoices

CAPP requested that TransCanada be directed to identify refund amounts as a separate item on all invoices.

Views of the Board

The Board agrees with CAPP that refund amounts should be identified separately on all invoices.

Decision

TransCanada is directed to show as a separate item, any amounts credited to shippers' invoices in regards to the Great Lakes' refund.

4.2 Interest Penalty

CAPP requested that TransCanada be required to add interest to the amount refunded to shippers at the rate of return on rate base if such invoices are not credited within 30 days of receipt of refunds from Great Lakes.

Views of the Board

The Board agrees that there should be some incentive for TransCanada to distribute the refund amounts in a timely fashion. However, given the Company's intention to credit monthly invoices for service as soon as possible following TransCanada's receipt of funds, the Board is of the view that 30 days may not allow sufficient time for TransCanada to apply the credit to shippers' monthly invoices in situations where funds are received just prior to the preparation of invoices. In the Board's view, 45 days should provide ample time for TransCanada to credit shippers' invoices.

Decision

TransCanada is directed to add interest to the amount refunded to shippers at the approved rate of return on rate base if such invoices are not credited within 45 days of the receipt of refunds from Great Lakes, or for any amounts already received, within 45 days from the date of these reasons. Interest should be calculated from the end of the applicable 45 day period to the invoice date.

4.3 Tennessee's Proposal

Tennessee submitted that if the Board considered that Tennessee's position is unique, and that a prospective mechanism is more appropriate for TransCanada's flow-through of the Great Lakes' refund, that inequity could be avoided if the Board required that a share of the Great Lakes' refund be determined for the past period in proportion to the excess TransCanada tolls which were included in the monthly demand charges that Tennessee paid pursuant to its contracts with the Canadian Suppliers. The remainder of the refunds could be distributed to current shippers if other past shippers do not object and/or are not in a position similar to Tennessee. In this way, Tennessee would not be inequitably precluded from obtaining a share of the Great Lakes' refund.

Views of the Board

The Board is of the view that Tennessee's case is not unique and that there are, no doubt, a number of other parties who will feel they will not receive an appropriate share of the refund under the terms of this decision. This being said, the Board would note as it did earlier that no decision on a matter such as this will be perfect. As a result, the Board has not been persuaded that a special allowance should be afforded Tennessee in order for it to receive what it considers to be a proper share of the Great Lakes' refund.

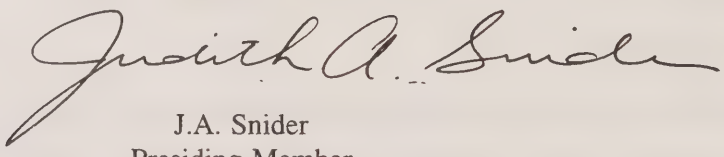
Decision

The Board rejects Tennessee's proposal that it be afforded unique status.

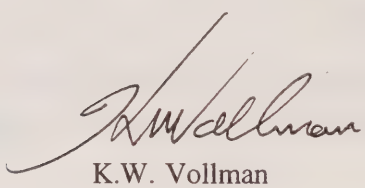
Chapter 5

Disposition

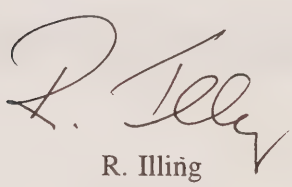
The foregoing chapters together with Order No. TG-7-96 constitute our Decision and Reasons for Decision on this matter.



J.A. Snider
Presiding Member



K.W. Vollman
Member



R. Illing
Member

Calgary, Alberta
September 1996

Appendix I

Order TG-7-96

ORDER TG-7-96

IN THE MATTER OF the *National Energy Board Act* ("the Act") and the Regulations made thereunder; and

IN THE MATTER OF a request dated 12 October 1995 by TransCanada PipeLines Limited ("TransCanada") for an Order setting out the manner in which TransCanada will dispose of funds received over an estimated three year period from Great Lakes Gas Transmission Limited Partnership ("Great Lakes").

BEFORE the Board on 6 September 1996.

WHEREAS the Board has received a request from TransCanada, dated 12 October 1995, pursuant to sections 12(1)(b) and 59 of the *National Energy Board Act*, for an Order setting out the manner in which TransCanada will dispose of funds received over an estimated three year period from Great Lakes;

IT IS ORDERED, pursuant to sections 12(1)(b) and 59 of the Act that:

1. Effective immediately, TransCanada shall commence to credit all refunded amounts to current firm shippers (i.e. FT, STS, and FST shippers) on TransCanada's system by crediting said shippers' monthly invoices for service as soon as possible following TransCanada's receipt of funds. The refunded amounts should include any interest earned while the amounts to be refunded were in the interest bearing account in accordance with the Board's directive of 27 December 1995;

2. TransCanada is directed to show as a separate item, any amounts credited to shippers' invoices in regards to the Great Lakes' refund; and

3. TransCanada is directed to add interest to the amount refunded to shippers at the approved rate of return on rate base if such invoices are not credited within 45 days of the receipt of refunds from Great Lakes, or for any amounts already received, within 45 days from the date of these reasons. Interest should be calculated from the end of the applicable 45 day period to the invoice date.

NATIONAL ENERGY BOARD

(signed by)
J.S. Richardson
Secretary